STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2011
v	No. 294112 Bay Circuit Court
MICHAEL LLOYD JACKSON, Defendant-Appellant.	LC No. 08-010666-FH

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Michael Lloyd Jackson appeals as of right his jury convictions for possessing a firearm while being ineligible to do so (felon-in-possession), MCL 750.224f, possessing a short-barreled shotgun, MCL 750.224b, and two counts of carrying or possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve concurrent terms of 34 months to 10 years in prison each on his convictions for being a felon-in-possession and possessing a short-barreled shotgun. The trial court also sentenced defendant to serve two years in prison each for his felony-firearm convictions. The trial court ordered him to serve his felony-firearm convictions concurrent to each other, but consecutive to his remaining sentences. The trial court also gave him credit for time served on his sentences for felon-in-possession and possession of a short-barreled shotgun. On appeal, defendant raises several claims of error that he maintains warrant reversal or dismissal of his convictions. We conclude that there were no errors warranting reversal. However, we agree that the trial court should have given defendant credit for time served against his sentences for felony-firearm rather than on his sentences for felon-in-possession and possessing a short-barreled shotgun. Accordingly, we affirm defendant's convictions, but remand for the ministerial task of correcting the judgment of sentence to properly reflect his credit for time-served.

I. BASIC FACTS

This case has its origins in an apparent altercation between several men at a residence in the early morning hours of July 4, 2008, in Bay City, Michigan.

James Lyman testified that he was a police officer with the Bay City police department. Lyman stated that he responded to a dispatch concerning a fight that possibly involved a firearm. As he drove toward the area indicated in the dispatch, he saw three men headed away from him and toward 11th Street and another three men headed toward his car. Lyman stopped his car,

exited, and ordered the three men approaching him to the ground. Lyman agreed that defendant was yelling and excitable at the scene and that he said something to the effect that those other guys were "swingin' on some girls," which he understood to mean striking them. Because the three men would not comply with his order, he drew his gun and repeated his order. Eventually, the three men got on the ground.

Officer John Harned testified that he was following Lyman on the way to the scene. He saw Lyman pull over next to three men. He, however, proceeded past Lyman and drove towards the three men who were walking away. The three men ran to the west and he lost them. Harned testified that all three of the men that ran away were wearing white t-shirts. After he lost sight of the three men, Harned went back to the point where Lyman stopped and helped him secure the scene.

Officers Leslie Gillespie and Brad Peter testified that they too responded to the dispatch. When she arrived, Gillespie saw that Lyman had three suspects on the ground at gun point. She assisted officer Lyman in handcuffing the suspects. When Peter arrived, Lyman and Gillespie had already secured the three suspects. Gillespie also noticed that a car was parked somewhat "cock-eyed into a driveway"; part of the car was "in the road, part was up into the driveway." She said she recognized the car from a stop that she had made two weeks earlier and that the car belonged to defendant. She said the car was running, had its lights on, and the front driver's side door was open. She also said that defendant had some injuries to his face—his eye was swollen.

Dawn Harsch testified that she lived next door to the home at issue. In the early morning hours of July 4, 2008, she heard "a lot of yelling" and so she looked outside. She saw a taller black man with a gun. The man started to take off his shirt and passed the gun to a shorter black man. The shorter black man then took the gun and stuck it in her yard. She stated that the shorter black man had a shirt on. Harsch told her husband to call 9-1-1, but the police arrived even before he could call. She then got her robe and went outside to tell an officer where the gun was located.

Officer Peter said that a neighbor approached him at the scene and spoke to him. After he spoke with her, Peter searched the bushes near the woman's home next to a fence. There he found a small sawed-off shotgun. Peter said that the neighbor indicated that the man with no shirt had had the shotgun. Defendant had no shirt on. The other two men detained at the scene, Cory Jackson—defendant's brother—and Malcolm Baty, both had shirts on. Harned said that he found a t-shirt lying in the driveway just south of where they located the gun. Harned noted that defendant was the only person at the scene who did not have a shirt on.

After the close of proofs, the jury found defendant guilty on each of the charges against him. Defendant now appeals.

II. MOTIONS FOR DIRECTED VERDICT AND NEW TRIAL

A. STANDARDS OF REVIEW

Defendant first argues that the trial court erred when it denied his motions for a directed verdict and a new trial. Specifically, defendant contends that there was insufficient evidence that that the shotgun belonged to him—that is, that he exercised dominion and control over the

weapon—and that the verdict was against the great weight of the evidence. For these reasons, he maintains, the trial court should have granted his motion for a directed verdict or his motion for a new trial. This Court reviews challenges to the sufficiency of the evidence by examining the record evidence "de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). However, this Court reviews a trial court's decision whether to grant a new trial on the grounds that the verdict was against the great weight of the evidence for an abuse of discretion. *Id.* at 84.

B. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant argues that there was no evidence that the shotgun at issue belonged to him. Specifically, he notes that there was no eyewitness testimony that he exercised dominion and control over the shotgun—as opposed to merely handling it—sufficient to establish that he possessed it.

Contrary to defendant's assertion on appeal, the prosecution did not have to prove that the shotgun at issue belonged to defendant. See *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992) (noting that a defendant can be guilty of possessing contraband even though he or she does not own the contraband); *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (noting that possession of a weapon is not the same thing as ownership of a weapon). Rather, in order to convict defendant on each of the charges, the prosecution had to prove that defendant possessed the shotgun found near Harsch's home. See *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008) (noting that identity is an element of every offense). And the prosecution could meet its burden by showing that defendant actually or constructively possessed the shotgun. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). A person who is otherwise not in actual possession of a firearm can be shown to be in constructive possession of the firearm by presenting evidence that the person knows about the weapon and exercises dominion or control over the weapon either directly or through another person. *Id.*; see also *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982). Moreover, the prosecution may establish possession through direct or circumstantial evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Here, Harsch testified that she looked outside after she heard "a lot of yelling" and saw a taller black man with a gun. She said that the taller man walked to the driveway near her house and, as he started to take off his shirt, he passed the gun to a shorter black man. The shorter man then took the gun and stuck it in her yard. Other testimony and evidence established that a short-barreled shotgun was found where Harsch saw the shorter black man place the gun.

This evidence was sufficient to establish that the taller black man actually or constructively possessed the shotgun. Harsch stated that she saw the taller black man holding the gun and that he passed it to the shorter man after he began to take his shirt off. From this testimony, a reasonable jury could infer that the taller black man had actual possession of the

shotgun—even if momentary—and only passed it to the shorter man because he could not continue to hold the weapon while removing his shirt.[1] Further, a reasonable jury could also conclude that the shorter man took possession at the taller man's direction and, from that, could also find that the taller man continued to have constructive possession even after he passed the weapon to the shorter man. *Hill*, 433 Mich at 470. Thus, if there was sufficient evidence to establish that defendant was the taller black man, then there was also sufficient evidence to establish that defendant possessed the shotgun.

Although Harsch did not identify defendant as the taller black man at trial, her testimony established that the taller black man took off his shirt. She also stated that the shorter black man had his shirt on and that the police arrived on the scene just moments after she saw the taller man hand the shotgun to the shorter man. Lyman testified that when he arrived on the scene there were three black men approaching his car and three walking away. Lyman stopped the three men who were approaching his car. He noted that defendant was among the three men and that he was the only person who had no shirt. The officers also found a t-shirt on the driveway. Harned testified that he passed Lyman and pursued the three men who were moving away. Although he did not apprehend those men, Harned stated that all three had white t-shirts on.

Given the evidence that the police arrived on the scene shortly after Harsch observed the episode with the gun, a reasonable jury could infer that all the participants in the altercation were in or near the yard at the time the police arrived. Because the officers' testimony established that defendant was the only man of the six observed at the scene who did not have on a shirt, the jury could reasonably infer that defendant was the taller black man that Harsch saw with the shotgun. Therefore, there was sufficient evidence to establish that defendant possessed the shotgun at issue. The trial court properly denied defendant's motion for a directed verdict premised on the sufficiency of the evidence.

C. GREAT WEIGHT OF THE EVIDENCE

Defendant also argues that, for the same reasons identified in his challenge to the sufficiency of the evidence, the jury's verdict was against the great weight of the evidence. "In order to warrant a new trial on the ground that the verdict was against the great weight of the evidence, the evidence presented at trial must preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Roper*, 286 Mich App at 89 (quotation omitted). As already noted, there was sufficient evidence to establish that defendant possessed the short-barreled shotgun at issue. The fact that the jury *could* have concluded that some other man possessed the shotgun does not alter the fact that there was clear evidence from which the jury could also conclude that defendant possessed the gun. *Hardiman*, 466 Mich at 428 ("It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences."). It is

---

[1] We note that momentary innocent possession is not a defense to being a felon-in-possession. See *People v Hernandez-Garcia*, 477 Mich 1039, 1039-1040 (2007); see also *People v Dupree*, 284 Mich App 89, 101 n 1; 771 NW2d 470 (2009) (opinion by M. J. KELLY, J.)

well-settled that the prosecution does not have to negate every reasonable theory consistent with a defendant's innocence; it is only required to present sufficient evidence to establish guilt. *Id.* at 428. Admittedly, defendant's brother testified that he was at the scene and that defendant did not have a gun. He also testified that there were other black men who did not have their shirts on. However, conflicting testimony alone is not sufficient to warrant relief. *Roper*, 286 Mich App at 89. In order to warrant relief on the basis of conflicting testimony, the directly contradictory testimony must be so far impeached that it was deprived of all probative value, must be such that the jury could not believe it, or must be such that it contradicted indisputable physical facts or defied physical realities. *Id.* This was not such a case. The jury was free to disbelieve defendant's witnesses and conclude that the inferences to be drawn supported a finding of guilt. The trial court did not err when it denied defendant's motion for a new trial on the grounds that the verdict was against the great weight of the evidence.

III. DOUBLE JEOPARDY

Defendant next argues that his convictions of felony-firearm in addition to his convictions for being a felon-in-possession and possessing a short-barreled shotgun violate the prohibitions against double jeopardy. See US Const, Am V; Const 1963, art 1, § 15. The double jeopardy clauses of the state and federal constitutions protect "against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). However, the double jeopardy clauses are not a limitation on the Legislature. *Id.* at 451. Accordingly, if it is evident that the Legislature intended to authorize cumulative punishments, this Court's inquiry is at an end. *Id.*

As defendant concedes, Michigan courts have already held that the Legislature authorized cumulative punishments for felony-firearm and any felony other than one of the four exceptions stated under MCL 750.227b(1). *Id.* at 452; *People v Mitchell*, 456 Mich 693, 697-698; 575 NW2d 283 (1998). There is no exception listed for being a felon-in-possession or possessing a short-barreled shotgun. Accordingly, defendant's claim of error is without merit.

IV. INSTRUCTIONAL ERROR ON STIPULATED ELEMENT

A. STANDARD OF REVIEW

Defendant next argues that the trial court erred when it refused to accept defendant's stipulation that he was ineligible to possess a firearm and instructed the jury that defendant was a felon because he had previously been convicted of possession of cocaine. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *Yost*, 278 Mich App at 353. But this Court reviews de novo questions of law involving the admission of evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

B. ANALYSIS

Although defendant frames this issue as one involving the trial court's refusal to accept defendant's stipulation, the record does not support defendant's characterization. Prior to voir dire of the jury, the trial court discussed some preliminary matters with trial counsel. As part of that discussion, defendant's trial counsel told the court that, while in chambers, he forget to note

that the parties had agreed that there would be "no reference to the habitual offender status" when the information was read to the jury, which the prosecutor agreed was the case. After discussing further preliminary matters, introducing the parties, and listing the names of witnesses, the trial court began to give some preliminary instructions:

> THE COURT: Okay. In a criminal case, which this is, the paper used to charge the defendant is called the Information. The Information in this case charges the defendant as follows, and I'm gonna read you the Information.
>
> It charges that on or about July the 4th, 2008, at a location of 2-2-2 North Jackson in Bay County, that the defendant did possess a firearm when ineligible to do so because he had been convicted of possession of cocaine—
>
> MR. DUNN [defendant's trial counsel]: Your Honor, may—
>
> THE COURT: —less than 25 grams.
>
> MR. DUNN: May counsel approach the bench?
>
> THE COURT: Yes.
>
> After a brief bench conference, the trial court started over:
>
> All right. Let me—let me rephrase that Information then. The charge is that the defendant on or about 7-4-08 at the location of 2-2-2 North Jackson, did possess a firearm when ineligible to do so because he was a person that was not eligible to possess a firearm. That's Count 1.

The trial court also instructed the jury that the information is not evidence and that the jury must not think that defendant is guilty because he was charged with having committed crimes.

After the close of proofs, the trial court instructed the jury on the two elements that the prosecutor had to prove to convict defendant of "possession of a firearm by a prohibited person":

> First, that the defendant possessed a firearm in this state.
>
> Second, that the defendant was legally prohibited from possessing a firearm. The defendant concedes that on the date charged he was legally—he was a legally prohibited person. You need not concern yourself with the reason the defendant is legally prohibited from possessing a firearm.

From this, it is clear that the trial court actually accepted defendant's stipulation. And, when defendant's claim of error is read as a whole, it is clear that defendant's actual claim of error is that the trial court should not have mentioned his prior conviction involving cocaine and that this error prejudiced his trial.

A defendant may stipulate that the prosecution has met its burden with regard to an element of an offense. See *Old Chief v United States*, 519 US 172, 186; 117 S Ct 644; 136 L Ed 2d 574 (1997) (noting that a stipulation is in effect an offer to admit that an element was satisfied and stating that "a defendant's admission is, of course, good evidence."). And, where a defendant's status as a convict is at issue, it is error for a trial court to permit the admission of evidence concerning the defendant's criminal record if the defendant offers to stipulate to his or her status as a convict. *Id.* at 191-192. Accordingly, it was error for the trial court to state to the jury that defendant had been convicted of a cocaine offense in light of his offer to stipulate to his status as a person who was ineligible to possess a firearm.

An error in the admission of evidence will not warrant relief unless it can be shown that it is more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 495-496. Here, the trial court apparently inadvertently mentioned defendant's prior cocaine conviction during voir dire. However, the trial court corrected its reading of the information after defendant's trial counsel objected in a bench conference. Further, at defendant's trial counsel's request, the trial court gave the jury a curative instruction:

> At the beginning of the case, I read to you the four charges. I mistakenly told you that the defendant was charged with possession of a firearm by a person convicted of possession of cocaine. Please disregard that part of the instruction. There is nothing involving the possession of cocaine in this case.

The trial court also reiterated to the jury that "[y]ou need not concern yourself with the reason the defendant is legally prohibited from possessing a firearm." Defendant's trial counsel agreed that the trial court's instructions cured any prejudice; accordingly, defendant's trial counsel waived any claim of error with regard to the trial court's mention of defendant's prior cocaine conviction. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000) (stating that trial counsel's expression of satisfaction with an instruction waives any error and, as a result, there is "no 'error' to review.").

Moreover, to the extent that defendant argues that his trial counsel was ineffective for waiving this claim of error, we conclude that there was no error warranting relief. Defendant's trial counsel properly objected to the trial court's reference to defendant's cocaine conviction outside the presence of the jury and properly asked the trial court to cure the error. The brief mention of defendant's cocaine conviction during voir dire was only minimally prejudicial and easily mitigated with a curative instruction. As such defendant's trial counsel's decision to propose an instruction and agree that it sufficed was well within the range of competent conduct. See *Yost*, 278 Mich App at 387 (stating that, in order to warrant relief for ineffective assistance, a defendant must show that his trial counsel's decision fell below an objective standard of reasonableness under prevailing professional norms). In addition, because the instructions actually cured any prejudice, see *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."), even if we were to conclude that defendant's trial counsel's decision fell below an objective standard of reasonableness under prevailing professional norms, it did not affect the outcome and does not warrant relief. *Yost*, 278 Mich App at 387.

V. CREDIT FOR TIME SERVED

Defendant next argues that the trial court erred when it applied a credit of 358 days for time served on his felon-in-possession and possession of a short-barreled shotgun convictions rather than on his felony-firearm convictions. Defendant is correct. Because defendant must serve his felony-firearm convictions consecutive and prior to his convictions for the underlying felonies, see MCL 750.227b(2), the trial court should have credited his time served against those convictions. See *People v Cantu*, 117 Mich App 399, 403-404; 323 NW2d 719 (1982).

VI. INSUFFICIENT EVIDENCE OF FELONY CONVICTION

A. STANDARD OF REVIEW

In a brief submitted pro per, defendant also argues that there was insufficient evidence to convict him of being a felon-in-possession. Specifically, defendant argues that none of his prior convictions constitute felonies within the meaning of the term under MCL 750.224f(5) and (6). For that reason, he concludes, this Court must vacate his conviction for felon-in-possession as well as his convictions for felony-firearm. This Court reviews de novo whether there was sufficient evidence to support a conviction. *Roper*, 286 Mich App at 83. This Court also reviews de novo the proper interpretation and application of a statute. *People v Martin*, 271 Mich App 280, 286-287; 721 NW2d 815 (2006).

B. ANALYSIS

Under MCL 750.224f(1), a person convicted of a felony is prohibited from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving or distributing a firearm for a period of three years after paying all fines for the violation, serving all terms of imprisonment imposed for the violation, and completing all terms of probation for the violation. However, if the felony is a specified felony, the prohibition lasts for five years after the completion of the conditions and the person must have his or her right to possess a firearm restored. MCL 750.224f(2). The Legislature defined the term felony for purposes of the felony-firearm statute to mean "a violation of a law . . . that is punishable by imprisonment for 4 years or more, or an attempt to violate such law." MCL 750.224f(5). Further, a specified felony is defined—in relevant part—as a "felony" involving the "use, attempted use, or threatened use of physical force against the person or property of another" or the "unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance." MCL 750.224f(6). Because the term specified felony incorporates the term felony, the definition of which applies to the whole section, see MCL 750.224f(5), in order to constitute a specified felony, the felony must also be punishable by imprisonment for 4 years or more. See *People v Parker*, 230 Mich App 677, 686-687; 584 NW2d 753 (1998).

In this case, defendant notes that his prior charge of possession of cocaine with the intent to distribute ultimately resulted in probation without judgment of guilt under MCL 333.7411(1). That statute provides that a discharge and dismissal under "this section shall be without adjudication of guilt and, except as provided in subsection (2)(b), is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime . . . ." *Id.* For that reason, he maintains, his prior charge for possession of cocaine

could not constitute a felony or specified felony within the meaning of MCL 750.224f. Likewise, he notes that the only other prior conviction that could qualify as a felony was for pleading guilty to attempting to assault, batter, obstruct, or endanger an officer (resisting and obstructing) under MCL 750.479. But the attempt statute provides for punishment by imprisonment for less than 4 years. See MCL 750.92(3). For that reason, he maintains, the conviction for attempting to resist and obstruct is not a felony within the meaning of MCL 750.224f(5). Defendant concludes that, because he had not been convicted of a felony within the meaning of MCL 750.224f(5), there was necessarily insufficient evidence to support his conviction.

Defendant's argument is well-made except that he overlooks one important fact: his trial counsel stipulated that he was a person that was ineligible to possess a firearm under MCL 750.224f. A stipulation is evidence capable of supporting an element of an offense. *Old Chief*, 519 US at 186. And the element of a charge to which a defendant stipulates cannot be attacked on the ground that the prosecutor failed to present sufficient evidence of that element. *People v Kremko*, 52 Mich App 565, 575, 218 NW2d 112 (1974). Therefore, there was sufficient evidence to support that element of felon-in-possession. Further, to the extent that defendant argues that his trial counsel's decision to stipulate constitutes ineffective assistance of counsel, defendant has not shown that the decision fell below an objective standard of reasonableness under prevailing professional norms.

Defendant had several prior convictions including a conviction for attempting to resist and obstruct an officer. Although defendant argues that this attempt was not a felony because the attempt statute provides that it is punishable by 2 years in prison, see MCL 750.92(3), MCL 750.224f(5) defines a felony to include an attempt to commit a felony that is itself punishable by 4 or more years. Thus, whether an attempt constitutes a felony must be ascertained by reference to the underlying felony, not the statute providing penalties for attempting to commit an offense. The offense of resisting and obstructing is generally punishable by imprisonment for not more than 2 years. MCL 750.479(2). However, if the violation causes an injury requiring medical attention, it is punishable by imprisonment for not more than 4 years. MCL 750.479(3). If the violation caused a serious impairment of body function or death, the defendant may be imprisoned for up to 10 years or 20 years respectively. MCL 750.479(4) and (5). Thus, an attempt to commit the offense prohibited under MCL 750.479 can constitute a felony within the meaning of MCL 750.224f(5), if the defendant attempted to resist and obstruct causing bodily injury requiring medical treatment, serious impairment of body function, or death.

In this case, defendant notes that he was sentenced under MCL 750.92(3), so the underlying offense had to be subject to imprisonment for less than five years. But a felony under MCL 750.224f(5) is any crime punishable by 4 years or more. So the fact that defendant was ultimately sentenced under MCL 750.92(3) does not preclude the possibility that defendant's underlying crime constituted a felony within the meaning of MCL 750.224f(5). Given that defendant was originally charged with resisting and obstructing as well as attempting to disarm an officer, it is possible that the prosecution could have presented evidence that defendant attempted to assault an officer and that when he did so he had the intent to physically injure the officer. Such an attempt would constitute a felony within the meaning of MCL 750.224f(5) and, because it includes an element of physical force against another, it would be a specified felony under MCL 750.224f(6). Given defendant's record, defendant's trial counsel might reasonably

have concluded that it was best to stipulate to this element rather than invite the prosecutor to present evidence concerning the circumstances involved in the prior conviction that might be more prejudicial to defendant. See *Yost*, 278 Mich App at 387.

Defendant's trial counsel's stipulation that defendant was ineligible to possess a firearm under MCL 750.224f was sufficient to support his conviction and defendant has not shown that this decision fell below an objective standard of reasonableness.

VII. IMPROPER IDENTIFICATION TESTIMONY

A. STANDARD OF REVIEW

Finally, defendant argues in his pro per brief that the trial court erred when it permitted officer Peter to testify that Harsch identified defendant as the man who had the shotgun. This Court reviews a trial court's evidentiary decision for abuse. *Yost*, 278 Mich App at 353.

B. ANALYSIS

At trial, the prosecutor asked Harsch whether an officer had asked her if she could identify the man who had the gun and she testified that "he did." The prosecutor then asked her whether she pointed to one of the men in custody and she said, "no." The prosecutor later called Officer Peter to the stand and asked him whether he had asked Harsch if she could identify the man who had the shotgun at the scene and he stated that he did. When the prosecutor asked what she did or said, defendant's trial counsel objected to the question because it asked for hearsay. The prosecutor responded that he was offering the testimony as a prior inconsistent statement because Harsch had testified that she did not identify defendant as the taller black man who had the shotgun. See MRE 801(d)(1)(A). The trial court agreed that the testimony was admissible for that purpose. At that point, Peter testified that, after he asked Harsch if she could identify the man with the shotgun, she "pointed to the black male subject who was on the ground who had no shirt on." Defendant's trial counsel then cross examined Peter about the circumstances under which Harsch pointed out defendant and noted that she might simply have pointed to him because he was the only man left who was not wearing a shirt.

After defendant's trial counsel made his motion for a directed verdict, the prosecutor asked the trial court to instruct the jury that Peter's testimony that Harsch pointed to defendant could be used as substantive evidence that defendant possessed the shotgun, rather than just evidence of a prior inconsistent statement. The trial court agreed that it was admissible for that purpose under MRE 801(d)(1)(C) and later instructed the jury that it could use the testimony as evidence that defendant possessed the shotgun.

On appeal, defendant argues that Harsch's gesture was not one of identification. Although the basis of his argument is not entirely clear, he appears to argue that, because Harsch denied having identified defendant as the man who held the shotgun and denied making the gesture, Peter's testimony could not be an identification. However, the rules of evidence only require that the witness be available for cross examination concerning the alleged statement and that the statement be one of identification of a person after perceiving the person. MRE 801(d)(1)(C). In this case, Harsch was available for cross-examination and the statement—as related by Peter—could be understood as one of identification of a person after perceiving the

person. As such, we cannot conclude that the trial court abused its discretion when it permitted the admission of this evidence. *Yost*, 278 Mich App at 353.

There were no errors warranting reversal of defendant's convictions. However, the trial court should have credited defendant's time served against his sentences for the felony-firearm convictions rather than for his sentences for felon-in-possession and possession of a short-barreled shotgun. Therefore, we remand this case for correction of the judgment of sentence.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause